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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935

No. ~~961~~ [redacted] 1

THE ATLANTIC REFINING COMPANY,
Appellant,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF ON BEHALF OF APPELLANT IN REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION.

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I.

Introduction.

This brief is submitted in reply to the statement filed herein by Appellee opposing the jurisdiction of this Court upon the asserted ground that no substantial Federal question is presented. In its Jurisdictional Statement heretofore filed pursuant to Rule 12, Paragraph 1, of the Rules of this Court (as amended March 2, 1936), Appellant has

carefully undertaken to state the "grounds upon which it is contended the questions involved are substantial", and this brief does not purport to be a reiteration of the matter contained therein. It is submitted strictly as a reply to Appellee on the jurisdictional issue, and the merits of this appeal are not argued herein except as incidental to the issue of whether a substantial Federal question is presented.

Appellee's Statement Opposing Jurisdiction is predicated solely upon the assertion that no such Federal question is raised by this appeal. There is no denial that appeal is the correct method of review here if any one of the constitutional questions involved is substantial. There is no denial that both the State Corporation Commission and the Supreme Court of Appeals of Virginia treated the questions of the constitutionality, under the Commerce Clause and under the Fourteenth Amendment, of the State statute involved as having been properly raised for their decision and as being determinative of the case. There is no denial that both the Commission and the court below passed upon the constitutional questions and determined them in favor of the validity of the State statute. There is no denial that the questions are properly preserved and brought here by the appeal papers; and there is no denial of the technical jurisdiction of this Court by this appeal under the Judicial Code.

The Court is referred to Appellant's jurisdictional statement for a statement of the nature of the case, the questions presented, and for copies of the statute involved and the opinion below.[1]

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[1] The opinion by the Supreme Court of Appeals of Virginia, hereby appealed from, has not yet been printed in the Virginia official reports. It has appeared, however, in 183 S. E. 243 (Advance Sheets).

II.

Decisions of This Court Subsequent to 1918 Reflect Significant and Controlling Developments in the Applicable Legal Principles.

In asserting the non-existence of a substantial Federal question, Appellee relies first upon *General Railway Signal Company* v. *Virginia,* 246 U. S. 500 (1918), in which this Court after stating that the case was "on the border line" held that the Virginia statute presently involved did not unlawfully burden interstate commerce.[2]

Appellee further contends that the legal principles applicable to fees measured by total authorized capital stock and imposed upon foreign corporations for the privilege of doing a local business were fixed and established in 1918 when the *Signal Company* case was decided, and that there have been no subsequent changes or developments in these principles. Appellee insists that such principles were "no longer open to controversy" even in 1918, and that therefore manifestly no substantial Federal question can exist today in a case of this kind.[3]

The General Railway Signal Company decision and its scope and significance has been adequately discussed by Appellant in its Jurisdictional Statement heretofore filed.

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[2] The two additional questions presented by this appeal, namely, whether said statute as applied to Appellant deprives it of its property without due process, and also denies it the equal protection of the laws, were neither involved nor considered in the *Signal Company* case.

[3] Appellee concludes its Statement Opposing Jurisdiction with the assertion that "it was subsequent to the establishment of 'the general principles' which are 'no longer open to controversy' that *General Railway Signal Co.* v. *Virginia, supra,* was decided."

Accordingly, this reply will be restricted to a demonstration of the unsoundness of Appellee's additional and more basic contention that there have been no developments in the applicable legal principles since 1918.

In the year 1918 this Court decided four cases involving fees measured by total authorized stock and imposed upon foreign corporations for the privilege of doing a local business. *International Paper Company* v. *Massachusetts,* 246 U. S. 135 (1918); *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146 (1918); *Cheney Bros.* v. *Massachusetts,* 246 U. S. 147 (1918); and *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500 (1918). In two of these cases the statutes were sustained because of the presence of a reasonable maximum limit,[4] whereas in the other two the statutes, without maximum limits, were held unconstitutional.[5] *The Cheney Bros. Company* case involved the identical Massachusetts statute upheld in *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68 (1913), and that precedent was squarely followed:

> "Bearing in mind that the tax of which these corporations are now complaining was imposed under the statute as it stood in 1913, *which was before the maximum limit was removed,* it follows from our decision in *Baltic Mining Co.* v. *Massachusetts* that the several objections based on the Constitution of the United States are all untenable * * * *."*[6]

The same Massachusetts statute, after the removal of the provision for a maximum limit, was sought to be applied to the two appellants in the *International Paper Company*

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[4] *Cheney Bros. Co.* v. *Massachusetts, supra,* and *General Railway Signal Co.* v. *Virginia, supra.*

[5] *International Paper Co.* v. *Massachusetts, supra,* and *Locomobile Co.* v. *Massachusetts, supra.*

[6] *Cheney Bros. Co.* v. *Massachusetts, supra,* at page 157.

and *Locomobile Company* cases. This single change in the statute was held sufficient to render it unconstitutional. Mr. Justice VanDevanter, speaking for the Court in the *Locomobile Company* case, said:

> "The tax is of a designated percent of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, part III, Section 56, was removed by Stat. 1914, c. 724, Section 1. As thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, and *Looney* v. *Crane Company*, 246 U. S. 178. This we have just decided in *International Paper Co.* v. *Massachusetts, ante* 135."

Thus, at the time *General Railway Signal Company* v. *Virginia, supra,* was decided, a few weeks following the foregoing decisions, this Court was apparently committed to the doctrine that a statute imposing a privilege tax upon foreign corporations and measured by total authorized capital stock was valid or invalid depending upon the presence or absence of a provision therein limiting the charge to a reasonable maximum amount. Since the Virginia statute involved in the *Signal Company* case had such a maximum limit provision, this Court expressly followed *Baltic Mining Company* v. *Massachusetts, supra,* just as it had done in the *Cheney Bros.* case.

The first clear departure from the view that the presence of a reasonable maximum charge would save an excise otherwise objectionable came seven years later in *Alpha Portland Cement Company* v. *Massachusetts*, 268 U. S. 203 (1925), where the Court said:

> "The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the lan-

guage of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with the conclusions reached in later opinions and is now definitely disapproved."

It remained, however, for the decision in *Cudahy Packing Company* v. *Hinkle,* 278 U. S. 460 (1929), to squarely hold for the first time that the presence of a reasonable maximum limit did not save a fee measured by total authorized capital stock and imposed upon foreign corporations for the privilege of doing a local business.[7] That decision also reiterated and amplified the disapproval of *Baltic Mining Company* v. *Massachusetts, supra,* which case, it will be remembered, had been followed by *General Railway Signal Co.* v. *Virginia, supra.*

It is manifest from the foregoing that under the *Alpha Portland Cement Company* and *Cudahy Packing Company* cases, the presence of a maximum limit provision in a statute otherwise objectionable is now inadequate to save its validity, whereas in 1918, when the *Signal Company* case was decided, such a maximum limit was deemed adequate. It is also manifest that since 1918 the parent decision to *General Railway Signal Co.* v. *Virginia, supra,* namely, the *Baltic Mining Co.* case, has been thoroughly discredited and expressly disapproved by this Court.

Another recent and most significant development in the law applicable to fees measured by total authorized capital stock and imposed upon foreign corporations for the privilege of doing a local business is found in the decision

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[7] As pointed out in Appellant's Jurisdictional Statement, the Washington filing fee held invalid in the *Cudahy Packing Company* case is indistinguishable from the Virginia statute here assailed. See dissenting opinion, per Mr. Justice Brandeis in *Cudahy Packing Co.* v. *Hinkle, supra,* at p. 468.

of *Air-Way Electric Appliance Corp.* v. *Day*, 266 U. S. 71 (1924), where this Court *for the first time* held that fees so measured offended the equal protection clause of the Constitution. That decision was rendered in 1924, six years after the time when appellee herein alleges that the law on this subject had become crystallized and "no longer open to controversy."

III.

Recent State Court Decisions Also Demonstrate That Significant and Controlling Developments in the Applicable Legal Principles Have Occurred Since 1918.

Not only have the developments heretofore noted occurred in the decisions of this Court since 1918, but also the uniform trend of recent decisions by the State courts is in accord with these developments.

The Supreme Court of California, in the leading State decision of *Perkins Manufacturing Co. v. Jordan*, 200 Calif. 667 (1927), expressly overruled its earlier decision in *Pick & Co.* v. *Jordan*, 169 Calif. 1. The earlier case had followed *Baltic Mining Co.* v. *Massachusetts, supra,* but in the *Perkins Manufacturing Company* case, the California court very correctly held that *Air-Way Electric Appliance Corp.* v. *Day, supra,* and *Alpha Portland Cement Co.* v. *Massachusetts, supra,* compelled a realignment of its views.[8] Thus, even without the additional clarification of *Cudahy Packing Co.* v. *Hinkle, supra,* which was not decided until 1929, the California court recognized that there had been significant and controlling developments in the law since 1918 when the *Baltic* case was still in good standing.

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[8] "The effect of this realignment of the Supreme Court of the United States is to necessarily overthrow our holding in the case of *Pick & Co.* v. *Jordan* * * *". *Perkins Mfg. Co.* v. *Jordan, supra,* at page 678.

A somewhat similar experience has been had in Montana where the recent case of *Chicago, etc., R. Co.* v. *Harman*, 89 Mont. 1 (1931) is contrary to an earlier Montana decision which had followed *Baltic Mining Co.* v. *Massachusetts, supra.*[9] The Supreme Court of Montana declined to follow *General Railway Signal Co.* v. *Virginia, supra,* properly classifying it with the discredited *Baltic Mining Co.* case, and noting that even in 1918 the *Signal Company* case had been "on the border line."

In each of the foregoing decisions the foreign corporation involved was entering the State for the first time, so that the charges in question were in effect entrance fees. Similarly, in *Badger* v. *Crockett*, 70 Utah 265 (1927), the Supreme Court of Utah interpreted the recent decisions of this Court in the same manner as did the highest tribunals in California and Montana, and accordingly held invalid the Utah entrance fee measured by authorized capital stock.[10]

A like fate met the entrance fee prescribed by South Carolina, when its Supreme Court followed *Cudahy Packing Co.* v. *Hinkle, supra,* in the recent dicision of *State* v. *Liggett & Myer Tobacco Co.*, 171 S. C. 511 (1933). The South Carolina Court expressed itself as follows:

> "Numerous earlier decisions of the Supreme Court of the United States are somewhat conflicting in their

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[9] *State ex rel. General Electric Co.* v. *Alderson*, 49 Mont. 29. For two intervening Montana decisions, see *J. L. Case Co.* v. *Stewart*, 60 Mont. 380, and *General Electric Co.* v. *Stewart*, 60 Mont. 387.

[10] The Utah annual license fee imposed upon foreign corporations for the privilege of continuing to do a local business was subsequently held invalid despite the presence of the maximum limit of only $750.00. *Minneapolis Steel & Machinery Co.* v. *Crockett*, 71 Utah 211 (1928).

holdings, but, as construing the Constitution, we feel constrained to follow the decision in the *Cudahy* case * * *."

For additional decisions in line with the foregoing, and which reflect and apply the recent developments in the decisions of this Court, see:

Montgomery Ward & Co. v. *Becker,* 334 Mo. 789 (1933);

State ex rel. Borden v. *Dammann,* 198 Wisconsin 265 (1929);

St. Louis-Southwestern Rwy. Co. v. *Emerson,* 30 F. (2d) 322 (C. C. A. 7th Circuit—1939). This case reversed the District Court decision, 27 F. (2d) 1005, which had squarely followed *General Rwy. Signal Co.* v. *Virginia, supra.*

St. Louis-Southwestern Rwy. Co. v. *Stratton,* 57 F. (2d) 211 (Dist. Court Illinois—1931).

IV.

Summary and Conclusion.

It is evident from the foregoing that the following significant developments have taken place since the "border line" decision of *General Railway Signal Co.* v. *Virginia, supra,* in the law applicable to fees measured by the total authorized capital stock of foreign corporations and charged for the privilege of doing, or continuing to do, a local business:

1. The decisions in *Alpha Portland Cement Co.* v. *Massachusetts, supra,* and *Cudahy Packing Co.* v. *Hinkle, supra,* renounced the doctrine, recognized as controlling in 1918, that the presence of a reasonable maximum limit saved the validity of an otherwise objectionable charge.

2. The decisions in these two cases "expressly disapproved" *Baltic Mining Co.* v. *Massachusetts, supra,* the parent decision to *General Railway Signal Co.* v. *Virginia, supra.*

3. The decision in *Air-Way Electric Appliance Corp.* v. *Day, supra,* held for the first time that authorized capital stock was an arbitrary, unequal and discriminatory measure for a charge upon foreign corporations, violative of the equal protection clause of the Constitution.

4. Decisions by the highest tribunals of several States, rendered since 1918, have, without exception,[11] held invalid statutes similar to the Virginia enactment here assailed, and in most instances have expressly recognized that significant changes and developments have recently occurred in the applicable legal principles.

It is respectfully submitted, therefore, that Appellee is palpably incorrect in asserting that the applicable legal principles were established in 1918 so as to be "no longer open to controversy", and that therefore "the appeal herein does not present a substantial Federal question".[12] On the contrary, as pointed out herein, there have been subsequent developments, evidenced by the decisions of this Court and expressly recognized and applied by the decisions of several State courts, which require that the Virginia statute here

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[11] The decision of the Supreme Court of Appeals of Virginia, from which this appeal is taken, represents the one exception. It is believed that such decision stands alone as the only case decided since 1918, and not subsequently overruled or reversed, which sustained a charge upon a foreign corporation measured solely by total authorized capital stock where such corporation had property situated in other jurisdictions, and was also engaged in interstate commerce.

[12] See Statement of Appellee Opposing Jurisdiction, page 5.

in question be held invalid. In any event, such subsequent developments at least present a situation within the rule stated in *Louisville & Nashville, R. R.* v. *Melton*, 218 U. S. 36, 49 (1909), where in refusing to dismiss a writ of error on the asserted ground that the question presented had been foreclosed by prior decisions and was, therefore, unsubstantial, this Court said:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. *We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous.*"[13] (Italics supplied.)

In concluding,[14] Appellant again refers the Court to the Jurisdictional Statement heretofore filed by it in this cause as containing a concise and accurate statement of the grounds upon which it is contended the questions involved

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[13] To same effect see: *Milheim* v. *Moffat Tunnel Improvement District*, 262 U. S. 710, at p. 717.

[14] Appellant deems it proper to point out that the opinion rendered below in this case by the State Corporation Commission of Virginia required 147 pages of the printed record filed in the Supreme Court of Appeals of Virginia, and the only questions considered therein were the constitutional ones now urged on this appeal. Manifestly, the State Corporation Commission believed that the questions here presented were substantial!

are substantial. Upon the grounds stated therein, as the same are supplemented hereby, the Appellant respectfully submits that the Federal questions presented are substantial, and that the judgment below should be reviewed and reversed by this Court.

Respectfully submitted,

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